

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD MARZO	:	DETERMINATION
	:	DTA NO. 820568
for Redetermination of a Deficiency or for Refund of	:	
New York State and City Personal Income Tax under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Period July 1, 2002 through	:	
June 30, 2004.	:	

Petitioner, Richard Marzo, 369 Corbin Avenue, Staten Island, New York 10308, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the period July 1, 2002 through June 30, 2004.

The Division of Taxation, by its representative, Christopher C. O'Brien (John E. Matthews, Esq., of counsel), brought a motion, filed October 19, 2005, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and (b) on the ground that there exists no material and triable issue of fact. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with the exhibits attached thereto in support of the motion. Petitioner, appearing by Neil Tepper, CPA, did not respond to the motion of the Division of Taxation. Accordingly the 90-day period for issuance of this determination commenced on November 18, 2005, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After

due consideration of the documents and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. The Division of Taxation (the “Division”) issued to petitioner, Richard Marzo, eight notices of deficiency, dated September 30, 2004, and addressed to him at “369 Corbin Ave., Staten Island, NY 10308-1814.” The first notice bore assessment identification number L-024544976-9 and asserted a total amount due of \$6,232.04. As indicated by the computation section of the notice, this amount consisted of withholding tax (penalty) assessed of \$6,232.04, for the period ended June 30, 2004. The second notice bore assessment identification number L-024544977-8 and asserted a total amount due of \$17,067.32. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$17,067.32, for the period ended March 31, 2004. The third notice bore assessment identification number L-024544978-7 and asserted a total amount due of \$7,044.19. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$7,044.19, for the period ended December 31, 2003. The fourth notice bore assessment identification number L-024544979-6 and asserted a total amount due of \$13,370.18. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$13,370.18, for the period ended September 30, 2003. The fifth notice bore assessment identification number L-024544980-6 and asserted a total amount due of \$9,947.22. As indicated by the computation summary section of the notice,

this amount consisted of withholding tax (penalty) assessed of \$16,110.08, and a credit of \$6,162.86, for the period ended June 30, 2003. The sixth notice bore assessment identification number L-024544981-5 and asserted a total amount due of \$9,269.10. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$15,330.84, and a credit of \$6,061.74, for the period ended March 31, 2003. The seventh notice bore assessment identification number L-024544982-4 and asserted a total amount due of \$9,850.13. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$15,961.65, and a credit of \$6,111.52, for the period ended December 31, 2002. The eighth notice bore assessment identification number L-024544983-3 and asserted a total amount due of \$4,790.07. As indicated by the computation summary section of the notice, this amount consisted of withholding tax (penalty) assessed of \$15,687.16, and a credit of \$10,897.09, for the period ended September 30, 2002.

2. On February 12, 2005, petitioner filed eight requests for conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") in protest of the eight notices of deficiency dated September 30, 2004. These requests were set forth in the Disagreement of Findings Section of each notice's payment document and were mailed to "New York State Department of Taxation and Finance, Tax Compliance Division - Bankruptcy, PO Box 5300, Albany, NY 12205-0300."

3. On March 11, 2005, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on September 30, 2004, but the request was not mailed until February 12, 2005, or in excess of 90 days, the request is late filed.

4. The Division's computerized Case and Resource Tracking System ("CARTS") Control Unit generated notices of deficiency, notices of estimated determination and notices of determination ("statutory notices"). In addition, CARTS generated a separate one-page "Mailing Cover Sheet," for each statutory notice and any enclosures referenced within the body of each notice. Each statutory notice, its accompanying Mailing Cover Sheet and appropriate enclosures formed a discrete unit within the batch of notices. The Mailing Cover Sheet was the first sheet in each unit. The computer preparation of such notices also included the preparation of a certified mail record ("CMR"). The CMR listed those taxpayers to whom statutory notices were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

5. Each computer-generated statutory notice was pre-dated with its anticipated mailing date, and each was assigned a certified control number. The certified number for each notice appeared on its accompanying Mailing Cover Sheet which also bore a bar code, the taxpayer's mailing address and a Departmental return address on the front and taxpayer assistance information on the back. Each notice's certified number was also recorded on the CMR under the heading "Certified No." The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of September 20, 2004 (expressed as the 264th day of 2004), which was manually changed to September 30, 2004.

6. After a statutory notice was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer placed the notice and associated documents into a windowed envelope, weighed and sealed the envelope and affixed the appropriate postage and fee amounts thereon. A Mail Processing Center clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the sealed, stamped envelopes and associated CMR to one of the various branches of the U.S. Postal Service ("USPS") located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

7. In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control Unit.

8. In the instant case, the CMR was a 26-page, fan-folded (connected) computer-generated document entitled "Certified Record For Presort Mail - Assessments Receivable." All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR listed 285 certified control numbers. Each such certified control number was assigned to an item of mail listed on the 26 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the eight notices of deficiency at issue was contained on pages 5 and 6 of the CMR. Corresponding to certified control numbers 7104 1002 9730 0289 3767, 7104 1002 9730 0289 3774, 7104 1002 9730 0289 3781, 7104 1002 9730 0289 3798, 7104 1002 9730 0289 3804, 7104 1002 9730 0289 3811, 7104 1002 9730 0289 3828 and 7104 1002 9730 0289 3835, were notice numbers L 024544976, L 024544977, L 024544978, L 024544979, L 024544980, L 024544981, L 024544982 and L 024544983, respectively, along with petitioner's name and address, "MARZO - RICHARD, 369 CORBIN AVE, STATEN ISLAND, NY 10308-1814," which were identical to the certified control numbers and corresponding notice numbers, and petitioner's name and address listed on the subject notices of deficiency and their associated mailing cover sheets.

10. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated September 30, 2004, and the initials of the postal employee, verifying receipt of the items.

11. The last page of the CMR, page 26, contained the preprinted entry of "285" corresponding to the heading "Total Pieces and Amounts." This preprinted entry was manually circled and below it to the right were the initials of a Postal Service employee. These same initials appeared on each page of the CMR. The aforementioned postmark of the Colonie Center Branch of the USPS appeared on the upper right side of the last page of the CMR.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and circling of the "285" indicated that all 285 pieces listed on the CMR were received at the post office.

13. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

14. The facts set forth above in Findings of Fact “4” through “13” were established through the affidavits of Geraldine Mahon and Bruce Peltier.¹ Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency, notices of estimated determination and notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The address on the subject notices of deficiency and associated mailing cover sheets was the same as the address given on the New York State personal income tax return for the year 2003, filed jointly by petitioner and his wife, Kim M. Marzo, on or about August 2, 2004, the most recent return filed when the notices of deficiency were issued. Additionally, the same address was used by petitioner on his requests for conciliation conference, dated February 11, 2005, and on his petition at issue, dated May 20, 2005.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division’s motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v.*

¹ In her affidavit, Ms. Mahon erroneously listed the eight notices at issue as notices of determination. However, the record clearly bears out that the subject notices are notices of deficiency and the distinction in nomenclature is inconsequential.

Baiden, 36 NY2d 539, 544, 369 NYS2d 667, 671; *John Wm. Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, 326). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where it has been determined that there is a deficiency of income tax. This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.” In this case, the record clearly establishes that the address listed on the subject notices of deficiency was petitioner’s last known address.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with BCMS, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer’s protests against notices are in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notices. (*See, Matter of Novar TV & Air Conditioner Sales and Service, Inc.*, Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation

conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the eight notices of deficiency at issue were mailed to petitioner on September 30, 2004. Specifically, this 26-page document listed certified control numbers with corresponding names and addresses, including petitioner’s eight control numbers, eight notice of deficiency (assessment) numbers, name and address. All 26 pages of the CMR bore a U.S. Postal Service postmark dated September 30, 2004. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee signed (initialed) page 26 of the CMR and circled “285” on that page to indicate receipt by the post office of all 285 pieces of mail listed thereon. This evidence is sufficient to establish that the Division mailed the subject notices of deficiency on September 30, 2004 (*see, Matter of Gordon*, Tax Appeals Tribunal, November 10, 2005).

H. Petitioner's requests for conciliation conference were filed on February 12, 2005, in excess of 90 days after the issuance of the eight notices of deficiency on September 30, 2004. Therefore, the requests were untimely filed (*see*, Tax Law § 681[b]; § 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. The Division of Taxation's Motion for Summary Determination is granted and the petition of Richard Marzo is dismissed.

DATED: Troy, New York
January 26, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE